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Resolving the Threat of Ambiguity by Defining a Threat to Violate the Fourth Amendment under *Kentucky v. King*

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NOTES

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INTRODUCTION

It is 9:00 P.M. you just got home from work and are about to enjoy a late dinner with your family. You join your family at the dinner table and strike up conversation with your daughter as she eagerly tells you about what happened today at school. Suddenly, she is interrupted by the ear-piercing screech of car tires on the street outside. You jump up and look out the window. It is dark, but you can see the silhouette of a man in a hooded jacket as he sprints across your front lawn, hops your fence, and disappears into the night. His car is left behind: the headlights are on, the engine is running, and the driver's door is wide open. A trail of swerving skid marks leads to the car's resting place: two tires remain on the street, and the other two are dug into the dirt on your front lawn. Panic sets in as you lock the bolt to the front door.

You return to the table, but as you sit down, the sound of approaching sirens and the glow of flashing lights fill the room. Seconds later, you hear the sound of people rushing toward your front door . . . Bang! Bang! Bang! Someone slams on the door, and a man screams, "Police! Police! Police!" You sit still and remain silent. You have never talked to a police officer before, and you are terrified. Another man screams, "We know you're in there! Open up or else!" You do not know what "open up or else" really means, but you know that these officers

sound angry as they pound on your door. At this point, have the police threatened to enter your home?

You then look out the window and see another officer running toward your home with a large door-breaching battering ram. You hear the distinct sound of metal-on-metal as the ram is placed up against your door. An officer yells, "We know you're in there, this is your last chance!" You do not know what it is your "last chance" for, but you know that battering ram can break down your door in a matter of seconds. At this point, have the police threatened to enter your home? What statements are sufficient to be considered a threat to enter? Can a threat be implied, or must a threat be explicitly clear?

These are crucial questions both for law enforcement officers and for citizens who may be subject to police search. Since the Supreme Court decided *Kentucky v. King*, lower courts across the country have struggled to apply its holding regarding threatened Fourth Amendment violations.[1] This note will seek to provide clarity to that issue.

Kentucky v. King addressed a dramatic circuit split regarding the doctrine of "police-created exigencies" and its application to warrantless searches and seizures.[2] To understand the complex puzzle that the Court attempted to piece together in *King*, we must begin with a brief explanation of the puzzle's individual pieces. The Constitution grants citizens protection for their "legitimate expectations of privacy"[3]

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[1] *Compare* United States v. Estrada, No. 1:11-CR-101 TS, 2012 WL 2367992, at *6 (D. Utah June 21, 2012) (finding that police officers' attempt to enter hotel room with a key card constituted a threat to violate the Fourth Amendment), *with* People v. Cervantes, No. A131298, 2012 WL 2055106, at *2, *5-6 (Cal. Ct. App. June 8, 2012) (holding that police officers did not impermissibly threaten to violate the Fourth Amendment by banging loudly on defendant's door and using key to enter).

[2] *See* Petition for Writ of Certiorari at *i, *King*, 131 S. Ct. 1849 (No. 09-1272), 2010 WL 1626437. The Petition states:

> This Court has carved out exceptions to the Fourth Amendment's warrant requirement, but has never determined whether police can create the exigent circumstances then used to justify a warrantless entry under those exceptions. As a consequence, the lower courts have been debating the issue for over forty years, resulting in a *dramatic split* among the circuits and an improper narrowing of the exceptions.

Id. at *9 (emphasis added) (footnote omitted).

[3] Illinois v. Andreas, 463 U.S. 765, 771 (1983). In determining whether an individual has a legitimate expectation of privacy, the Court applies a two part test: (1) the individual must exhibit a subjective expectation of privacy; and (2) that expectation is one that society views as objectively reasonable. *See* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). For a list of police conduct that has been held to not violate a reasonable expectation of privacy, see Dana Raigrodski, *Reasonableness*

within the home.[4] The Fourth Amendment protects these expectations by "safeguard[ing] the privacy and security of individuals against arbitrary invasions by government officials."[5] These safeguards, including the general requirement that police must obtain a warrant before searching a home,[6] are a means of ensuring that searches are "authorized by law and . . . limited in . . . scope."[7]

Over the years, the Court has carved out several limited exceptions to the warrant requirement that enable the government to conduct warrantless searches of the home.[8] These exceptions (called "exigent circumstances") recognize the reality that the needs of law enforcement may be "so compelling that [a] warrantless search is objectively reasonable."[9] These exceptions come at a price, however, as they shift discretion away from an impartial judge and place it directly in the hands of law enforcement in the field.[10] As a result, defendants occasionally

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and Objectivity: A Feminist Discourse of the Fourth Amendment, 17 TEX. J. WOMEN & L. 153, 160-62 (2008).

[4] The protection of privacy within the home is "at the core of the Fourth Amendment." Wilson v. Layne, 526 U.S. 603, 612 (1999); *see* Craig M. Bradley, *"Knock and Talk" and the Fourth Amendment*, 84 IND. L.J. 1099, 1100-04 (2009). Bradley argues that the Court has historically placed special emphasis on Fourth Amendment protections within the home. Bradley states that the "concern for privacy in the home is, of course, at the root of the Fourth Amendment itself." *Id.* at 1101.

[5] Camara v. Mun. Court of City and Cnty. of S.F., 387 U.S. 523, 528 (1967).

[6] *King*, 131 S. Ct. at 1856; Illinois v. Rodriguez, 497 U.S. 177, 181 (1990).

[7] Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 621-22 (1989) (noting that the warrant requirement ensures that the search is not a "random or arbitrary" intrusion by the government).

[8] *See, e.g.*, Michigan v. Fisher, 558 U.S. 45 (2009) (concluding that a warrantless entry is justified to give aid when police found property damage and blood, and observed a man inside a home yelling); Brigham City v. Stuart, 547 U.S. 398, 403 (2006) (concluding that a warrantless entry is justified "to prevent the imminent destruction of evidence"); Mincey v. Arizona, 437 U.S. 385, 392 (1978) (concluding that a warrantless entry is justified to render emergency aid to an individual in need); United States v. Santana, 427 U.S. 38, 38-39 (1976) (concluding that a warrantless entry is justified when the police are in "hot pursuit" of a suspect).

[9] *Mincey*, 437 U.S. at 394. The Fourth Amendment protects individuals only from *unreasonable* searches and seizures, not a warrantless search in general. *See* U.S. CONST. amend. IV. Therefore, under a legitimate exigent circumstance, a warrantless search does not violate the Fourth Amendment's protection against unreasonable searches and seizures because the search has become objectively reasonable under the circumstances. *See Mincey*, 437 U.S. at 394.

[10] This concern arises because of the "importance of informed, detached and deliberate determinations" as to whether a search is reasonable. Schmerber v. California, 384 U.S. 757, 770 (1966) (discussing the search of one's own body); *see* Steagald v. United States, 451 U.S. 204, 221-22 (1981) ("In the absence of exigent circumstances, we have consistently held that such judicially untested determinations are not reliable enough to justify an entry into a person's home to arrest him without a warrant . . . ."); Aguilar v. Texas, 378 U.S. 108, 110-11 (1964) ("An evaluation of the constitutionality of a search warrant should begin with the rule that 'the informed and deliberate determinations of magistrates empowered to issue warrants . . . are to be

accuse law enforcement of improperly creating or manufacturing the circumstances that lead to the exigency as a means to circumvent the warrant requirement.[11]

To curb the risk of abuse of the exigent-circumstance doctrine, courts across the nation adopted the police-created exigency doctrine.[12] This doctrine precludes application of the exigent-circumstance doctrine, which serves to render a warrantless search of a home objectively reasonable, when the exigency that justified the warrantless search resulted from actions taken by law enforcement and *not* the free will of the suspect.[13] Thus, if the police created the exigency, then the exigent-circumstance exception to the warrant requirement is inapplicable and the search violated the Fourth Amendment.

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preferred over the hurried action of officers . . . who may happen to make arrests.'" (quoting United States v. Lefkowitz, 285 U.S. 452, 464 (1932) (alterations in original)); Johnson v. United States, 333 U.S. 10, 13-14 (1948) ("[The Fourth Amendment's] protection consists in requiring that [inferences from evidence] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferretting out crime."). For further information regarding the potential issues with evading the Fourth Amendment's warrant requirement, see Wayne D. Holly, *The Fourth Amendment Hangs in the Balance: Resurrecting the Warrant Requirement Through Strict Scrutiny*, 13 N.Y.L. SCH. J. HUM. RTS. 531 (1997). Holly notes that both the Supreme Court and the U.S. Congress have "eroded the warrant requirement" of the Fourth Amendment by "weaken[ing] . . . restrictions on the power of the government to [enter a citizen's home] without a warrant." *Id.* at 532. Holly refers to the erosion of the warrant requirement as a "frontal assault upon Fourth Amendment rights," and warns that the shift away from strict Fourth Amendment protections jeopardizes the security of citizens from "overzealous and arbitrary police action." *Id.* at 534. Holly argues that the Court should enforce a strict "warrant requirement and examine warrantless searches with strict scrutiny." *Id.* at 540.

[11] In these instances, victims of an alleged improper warrantless search or seizure claim that the conduct of law enforcement officials, not the conduct of the occupant, prompted the warrantless search. *See, e.g.*, United States v. Coles, 437 F.3d 361 (3d Cir. 2006) (holding police officers impermissibly created the exigency where the officers repeatedly knocked on the accused's hotel room door under false pretenses and then entered the room without a warrant after announcing themselves as police officers and hearing rustling and toilet flushing).

[12] Kentucky v. King, 131 S. Ct. 1849, 1857 (2011) (citing United States v. Chambers, 395 F.3d 563, 566 (6th Cir. 2005); United States v. Gould, 364 F.3d 578, 590 (5th Cir. 2004) (en banc); United States v. Duchi, 906 F.2d 1278, 1284 (8th Cir. 1990)).

[13] *Id.* As the Court explained,

> Under [the police-created exigency] doctrine, police may not rely on the [exigent circumstance] when that exigency was "created" or "manufactured" by the conduct of the police. *See, e.g.*, *United States v. Chambers,* 395 F.3d 563, 566 (C.A.6 2005) ("[F]or a warrantless search to stand, law enforcement officers must be responding to an unanticipated exigency rather than simply creating the exigency for themselves"); *United States v. Gould,* 364 F.3d 578, 590 (C.A.5 2004) (en banc) ("[A]lthough exigent circumstances may justify a warrantless probable cause entry into the home, they will not do so if the exigent circumstances were manufactured by the agents" (internal quotation marks omitted)).

Id.

Prior to *Kentucky v. King*, several Circuit Courts of Appeals across the nation agreed that the police-created exigency doctrine required a showing of "something more than mere proof that fear of detection by the police caused the [exigency]."[14] The circuits differed, however, on how they applied the doctrine.[15] This circuit split prompted the Court to grant certiorari in *Kentucky v. King*.[16]

The Supreme Court decided *Kentucky v. King* on May 16, 2011.[17] The Court attempted to balance the need for investigative efficiency with the protections of citizens' Fourth Amendment privacy rights[18] and held that the exigent-circumstance doctrine "applies when the police do not gain entry to premises by means of an actual or *threatened* violation of the Fourth Amendment."[19] Therefore, a warrantless search is

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[14] *Id.*

[15] *Compare* King v. Commonwealth, 302 S.W.3d 649, 656 (Ky. 2010) (adopting the following two-part test: (1) "courts must determine 'whether the officers deliberately created the exigent circumstances with the bad faith intent to avoid the warrant requirement;'" and (2) where police have not acted in bad faith, courts must determine "'[w]hether, regardless of good faith, it was reasonably foreseeable that the investigative tactics employed by the police would create the exigent circumstances relied upon to justify a warrantless entry.' If so, then the exigent circumstances cannot justify the warrantless entry." (citations omitted)), *and* Mann v. State, 161 S.W.3d 826, 834 (Ark. 2004) (in adopting a foreseeability test, the Supreme Court of Arkansas stated "[w]hether, regardless of good faith, it was reasonably foreseeable that the investigative tactics employed by the police would create the exigent circumstances relied upon to justify a warrantless entry"), *with Gould*, 364 F.3d at 590 (stating the test as (1) "whether the officers deliberately created the exigent circumstances with the bad faith intent to avoid the warrant requirement"; and (2) "even if they did not do so in bad faith, whether their actions creating the exigency were sufficiently unreasonable or improper as to preclude dispensation with the warrant requirement"), Ewolski v. City of Brunswick, 287 F.3d 492, 504 (6th Cir. 2002) (simply requiring some showing of police conduct indicating an intent to avoid the warrant requirement), United States v. Duchi, 906 F.2d 1278, 1284 (8th Cir. 1990) (requiring an inquiry into "the reasonableness and propriety of the investigative tactics that generated the exigency," and rejecting the requirement that the police officers acted in "bad faith"), *and* United States v. MacDonald, 916 F.2d 766, 772 (2d Cir. 1990) (holding that law enforcement officials "do not impermissibly create the exigency" so long as the officials "act in an entirely lawful manner").

[16] Kentucky v. King, 131 S. Ct. 61 (2010) (granting certiorari in part).

[17] *King*, 131 S. Ct. 1849 (2011).

[18] *Id.* at 1862. When deciding whether warrantless entry is justified, the Court essentially balances the privacy rights granted by the Fourth Amendment with the need for investigative efficiency. In *Mincey v. Arizona*, for example, the Court noted that the investigation of a crime would be simple if warrants were not required; however, the Fourth Amendment reflects the view that the privacy of an individual's home may not be completely disregarded for the sake of "maximum simplicity in enforcement of the criminal law." Mincey v. Arizona, 437 U.S. 385, 393 (1978); *see also* Steven B. Dow, *"Step Outside, Please": Warrantless Doorway Arrests and the Problem of Constructive Entry*, 45 NEW ENG. L. REV. 7, 8-10 (2010) (noting that the "reasonableness" requirement of the Fourth Amendment requires the balancing of an individual's privacy rights and "the interest of the public in effective law enforcement").

[19] *King*, 131 S. Ct. at 1862 (emphasis added).

impermissible when law enforcement violates, or threatens to violate, the Fourth Amendment "*prior* to the exigency."[20]

This note argues that the rule in *Kentucky v. King* is fatally vague. A long line of case law defines how law enforcement may *actually* violate the Fourth Amendment,[21] yet the Court has never defined how law enforcement can *threaten* to violate the Fourth Amendment.[22] This note argues that the proper test for analyzing an alleged threatened violation should place reasonableness—a core justification for the exigent circumstance doctrine[23]—at the heart of the analysis. This test fills the gaps in *Kentucky v. King* by accounting for both explicit and implied threats and determines that a threat can be implied through words, conduct, or a combination of both.

Part I of this note provides a brief overview of the Fourth Amendment, exigent circumstances, and the police-created exigency doctrine. Part II discusses the facts and holding of *Kentucky v. King*, paying specific attention to the Court's analysis and reasoning. Part III exposes the ambiguity of the scope of a threatened violation of the Fourth Amendment in *Kentucky v. King*. Part IV discusses the distinction between an actual and a threatened violation of the Fourth Amendment and proposes that the lower courts should adopt an objective reasonableness approach in defining the scope of a threatened violation of the Fourth Amendment. Part V argues that the test proposed in Part IV flows directly from Fourth Amendment jurisprudence, adheres to the Court's holding in *Kentucky v. King*, and resolves some of the Court's primary concerns surrounding the doctrine.

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[20] *Id.* at 1863 (emphasis added) (holding that a warrantless search was justified "[b]ecause the officers . . . did not violate or threaten to violate the Fourth Amendment prior to the exigency").

[21] For a description of an "actual" violation of the Fourth Amendment, see *infra* Part IV.A.

[22] *See generally King*, 131 S. Ct. 1849. Justice Alito's opinion did not set out clear guidelines for determining whether a threatened violation of the Fourth Amendment is present; the opinion contained merely *one* additional example:

> [The officers'] conduct was entirely consistent with the Fourth Amendment, and we are aware of no other evidence that might show that the officers either violated the Fourth Amendment or threatened to do so (for example, by announcing that they would break down the door if the occupants did not open the door voluntarily).

Id. at 1863.

[23] *Id.* at 1856 (holding that the exigent-circumstance doctrine attaches when the circumstances make the "needs of law enforcement so compelling that [a] warrantless search is objectively *reasonable* under the Fourth Amendment." (alteration in original) (emphasis added) (quoting *Mincey*, 437 U.S. at 394)).

More specifically, this note proposes that in applying *Kentucky v. King*, the lower courts should employ a test I refer to as the "Reasonably Interpreted Threat test." The Reasonably Interpreted Threat test states that a threat to violate the Fourth Amendment includes (1) any assertion by a government official (through words or conduct), (2) that expresses an intent to act in violation of the Fourth Amendment, (3) when viewed objectively[24] under the totality of the circumstances. The Reasonably Interpreted Threat test accounts for explicit and implied threats to violate the Fourth Amendment,[25] thus rebutting a potential interpretation of the Court's holding in *Kentucky v. King*. This note argues that the Reasonably Interpreted Threat test is consistent with Fourth Amendment jurisprudence because it preserves the reasonableness requirement—the "touchstone of the Fourth Amendment"[26]—and adopts the Court's preference for purely objective review.[27]

This note focuses on the meaning of a "threatened violation" of the Fourth Amendment in the context of the home and deals only with one exigent circumstance: the prevention of the imminent destruction of evidence.[28] This note does not address the conduct of the victim of the alleged Fourth Amendment violation, nor does it address whether that conduct

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[24] "Objectively" in this instance means without regard to the subjective intentions or state of mind of law enforcement. *See* BLACK'S LAW DICTIONARY 1178 (9th ed. 2009) (defining objective as "[o]f, relating to, or based on externally verifiable phenomena, as opposed to an individual's perceptions, feelings, or intentions.").

[25] For the definition of an implied threat within the context of this note, see *infra* note 99. For a description of how the test accounts for implied threats, see *infra* Part IV.B.

[26] Florida v. Jimeno, 500 U.S. 248, 250 (1991) (citing Katz v. United States, 389 U.S. 347, 360 (1967)).

[27] *See generally* Kentucky v. King, 131 S. Ct. 1849 (2011). While analyzing the approaches adopted by the circuit courts, Justice Alito articulated many issues associated with subjective components. For example, when discussing the subjective bad faith standard, Justice Alito noted that the Court has never held that "outside limited contexts . . . an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment." *Id.* at 1859 (quoting Whren v. United States, 517 U.S. 806, 812 (1996)). Justice Alito stated that "a reasonable foreseeability test would also introduce an unacceptable degree of unpredictability" that would be plagued with difficulty for both the courts and law enforcement officials alike. *Id.* Moreover, Justice Alito notes that a good investigative tactics "approach fails to provide clear guidance for law enforcement officers . . . ." *Id.* at 1861; *see also* Eric F. Citron, *Right and Responsibility in Fourth Amendment Jurisprudence: The Problem With Pretext*, 116 YALE L.J. 1072, 1077-76 (2007) (noting that an objective approach has been "at the heart" of Fourth Amendment cases for the past two decades, and that the Court refuses to look into the subjective intent of law enforcement).

[28] *See* Brigham City v. Stuart, 547 U.S. 398, 403 (2006) (recognizing the prevention of imminent destruction of evidence as a valid exigency exception to the warrant requirement).

was sufficient to invoke the exigency; rather, this note only aims to address the conduct of law enforcement and its role in the police-created exigency doctrine.

I. THE HISTORICAL BACKDROP

In the 1943 case *West Virginia State Board of Education v. Barnette*,[29] Justice Jackson stated, "[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."[30] In doing so, "[o]ne's right to life, liberty, and property . . . and other fundamental rights may not be submitted to vote[.]"[31] One subject withdrawn from the "vicissitudes of political controversy" is the Fourth Amendment's protection against "unreasonable searches and seizures."[32] This right, however, has been a topic of great debate in the courts, challenging legal minds for decades.[33]

The Fourth Amendment has its roots in a line of English common law that recognized an individual's home as "his castle,"[34] irrespective of how extravagant or decrepit that home may have been.[35] In preserving this notion, the Court has

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[29] 319 U.S. 624 (1943).

[30] *Id.* at 638.

[31] *Id.*

[32] U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .").

[33] *See* Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 809 (2004). Kerr states that scholars have "describe[d] Fourth Amendment law as unruly," with few principles that are actually agreed upon. *Id.* Kerr states that "trying to understand the Fourth Amendment is a bit like trying to put together a jigsaw puzzle with several incorrect pieces: no matter which way you try to assemble it, a few pieces won't fit." *Id.*

[34] Semayne's Case, (1604) 77 Eng. Rep. 194, 196 (Q.B.) ("That the house of every one is to him as his Castle and Fortress, as well for his defense against injury and violence, as for his repose."); *see also* Evan B. Citron, *Say Hello and Wave Goodbye: The Legitimacy of Plain View Seizures at the Threshold of the Home*, 74 FORDHAM L. REV. 2761, 2779 (2006). Citron notes that the idea of affording substantial protection to the home was "established as early as 1604," and that "[t]he precept that a man's house is his castle is one of the oldest and most deeply rooted principles in Anglo-American jurisprudence." *Id.* (internal quotation marks omitted). Citron also notes that the "sacred and special nature" of residential privacy "was of critical importance to the founders." *Id.*

[35] Dow, *supra* note 18, at 8.

> The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement.

identified that the Fourth Amendment creates a supreme zone of privacy[36] "free from unreasonable government intrusion."[37] As a result, the Court has drawn a "firm line" at the entrance of the home,[38] requiring that a warrant "generally" must be obtained to conduct a search.[39] The Court presumes that warrantless searches are "*per se* unreasonable"[40] and treats any search conducted by the government as an inherent invasion of privacy.[41]

The exigent circumstances doctrine carves out several exceptions to the warrant requirement.[42] Since the "touchstone

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Id. (quoting Payton v. New York, 445 U.S. 573, 601 (1980)) (internal quotation marks omitted).

[36] *See Payton*, 445 U.S. at 589 ("The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home."). The Court in *Payton* indicated that "the Fourth Amendment has drawn a firm line at the entrance to the house," further illustrating the strong emphasis placed by the Court on Fourth Amendment protections within the home. *Id.* at 590.

[37] Silverman v. United States, 365 U.S. 505, 511 (1961); *see also* United States v. Karo, 468 U.S. 705, 714 (1984) ("[P]rivate residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant . . . ."); United States v. U.S. Dist. Ct., E.D. Mich., 407 U.S. 297, 313 (1972) ("[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed . . . .").

[38] *Payton*, 445 U.S. at 590 ("[T]he Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.").

[39] Kentucky v. King, 131 S. Ct. 1849, 1856 (2011) (noting that "although the text of the Fourth Amendment does not specify exactly when a warrant must be obtained, th[e] Court has inferred that a warrant must generally be secured"); *Payton*, 445 U.S. at 576 (1980); *see also Investigation and Police Practices*, 35 GEO. L.J. ANN. REV. CRIM. PROC. 3 (Simon Latcovich & Erin Murphy eds., 2006) (noting that, "interpreted literally," the Fourth Amendment does not explicitly require a warrant for every search or seizure; however, "the Supreme Court imposes a presumptive warrant requirement").

[40] *See* California v. Acevedo, 500 U.S. 565, 580 (1991) (holding that searches "conducted outside the judicial process" are "*per se* unreasonable"). The Court in *Acevedo* further noted that the warrant requirement is "subject only to a few specifically established and well-delineated exceptions." *Id*. (quoting *Mincey v. Arizona*, 437 U.S. 385, 390 (1978)) (internal quotation marks omitted); *see also Payton*, 445 U.S. at 586 (1980) (holding that "a basic principle of Fourth Amendment law" is that "searches and seizures inside a home without a warrant are presumptively unreasonable"); Silverman v. United States, 365 U.S. 505, 511 (1961) ("At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.").

[41] *Investigation and Police Practices*, *supra* note 39, at 5 (2006) ("A search is a governmental invasion of a person's privacy.").

[42] *See* Brigham City v. Stuart, 547 U.S. 398, 403 (2006) (noting that warrantless entry may be justified "to fight a fire and investigate its cause, to prevent the imminent destruction of evidence, or to engage in 'hot pursuit' of a fleeing suspect" (citations omitted)). The Court in *Kentucky v. King* recognized the legitimacy of these exceptions. *King*, 131 S. Ct. at 1856. For example, the Court indicated that law enforcement may enter a home without a warrant to render "emergency aid." *Id.* (citing *Brigham City*, 547 U.S. at 403).

of the Fourth Amendment is reasonableness,"[43] the justification behind the exigent circumstances doctrine is that in certain instances, "the needs of law enforcement [are] so compelling that [a] warrantless search is objectively reasonable . . . ."[44] The doctrine is thus a narrowly tailored, Court-created list of circumstances that are pre-determined to satisfy the Fourth Amendment's reasonableness requirement.[45]

The exigency at issue in *Kentucky v. King* was the prevention of the imminent destruction of evidence,[46] which enables the warrantless search of a home upon law enforcement's reasonable belief that the destruction of evidence is *imminent*.[47] The Court has long recognized the necessity of this exigency[48] because police frequently face "now or never" scenarios[49] that

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[43] *Brigham City*, 547 U.S. at 403 (2006).

[44] *King*, 131 S. Ct. at 1856 (second alteration in original) (citing *Mincey*, 437 U.S. at 394).

[45] *See Katz*, 389 U.S. at 357 (1967) (holding that warrantless searches should be "subject only to a few specifically established and well-delineated exceptions"). It is important to note, however, that warrantless searches and seizures conducted under the exigent-circumstance doctrine are still subject to review by the courts. A court may review a warrantless search or seizure to determine whether or not an exigency actually existed, and whether or not the search or seizure was appropriate under the circumstances. *See* Terry v. Ohio, 392 U.S. 1, 25-26 (1968) (holding that a search must be strictly limited to the exigencies of the situation).

[46] *See generally King*, 131 S. Ct. 1849.

[47] *See Brigham City*, 547 U.S. at 403 (citing Ker v. California, 374 U.S. 23, 40 (1963)). The Court has placed several constraints on this exigency before a failure to obtain a warrant would be justified. First, the time constraints of obtaining a warrant must have been sufficiently burdensome to the investigation. *See* McDonald v. United States, 335 U.S. 451, 455 (1948). In *McDonald*, the Court noted that the suspect was under surveillance by law enforcement for months, and that during this time, a search warrant could have been obtained. *Id*. at 454-55. The Court further remarked that it would not allow the "constitutional barrier that protects the privacy of the individual to be hurdled so easily." *Id.* at 455. Second, a warrantless search will not be justified if the police could have taken less intrusive action to prevent the destruction of evidence while waiting for a warrant to be issued. *See* United States v. Jeffers, 342 U.S. 48, 51-52 (1951) (holding warrantless search was not justified when officers admitted that they could have prevented the destruction or removal of evidence by guarding a hotel room door and restricting entry); Illinois v. McArthur, 531 U.S. 326, 331-32 (2001) (holding that a seizure by guarding the defendant's home and restricting his entry until a warrant was obtained was lawful; the police had probable cause to believe that evidence was inside the trailer home, and the police had good reason to believe that, if defendant was permitted to enter, he would destroy the evidence). Finally, a warrantless search of a home will typically be unjustified where the offense being investigated is "minor." Welsh v. Wisconsin, 466 U.S. 740 (1984) (holding that the presumption of unreasonableness of a warrantless search and seizure is particularly hard to overcome for minor offenses, and stating that "the gravity of the underlying offense" is an important factor to consider).

[48] *King*, 131 S. Ct. at 1856 (citing *Brigham City*, 547 U.S. at 403).

[49] Roaden v. Kentucky, 413 U.S. 496, 505 (1973) (observing that in "exigent circumstances in which police action literally must be 'now or never' to preserve the evidence of the crime," warrantless search and seizure is reasonable); *see also Schmerber*, 384 U.S. at 770 (noting that an officer may reasonably believe that, under

require quick action to prevent the destruction of tangible evidence. Under these circumstances, it would be "foolish" for the police to take the time to secure a warrant.[50] Because tangible evidence is preferable for investigative accuracy,[51] the Court has justified this exception on the expectation that it would result in more guilty individuals being prosecuted and more innocent individuals going free.[52] Adding to its importance, this exigency frequently permits warrantless searches[53] in narcotics cases because "drugs [can] be easily . . . flush[ed] . . . down a toilet or rins[ed] . . . down a drain."[54]

Though well-established in Fourth Amendment jurisprudence, the destruction of evidence exigency presents unique issues under the police-created exigency doctrine that troubled the lower courts prior to *Kentucky v. King*.[55] These difficulties result from the fact that the police, in some way, *always* create the exigency in destruction of evidence cases,[56]

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the circumstances, "the delay necessary to obtain a warrant . . . threatens the destruction of evidence" (citation omitted) (internal quotation marks omitted)).

[50] Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 768 (1994) ("In a wide range of fast-breaking situations—hot pursuits, crimes in progress, and the like—a warrant requirement would be foolish. Recognizing this, the modern Supreme Court has carved out an 'exigent circumstances exception' to its so-called warrant requirement.").

[51] *See* Note, *Police Practices and the Threatened Destruction of Tangible Evidence*, 84 HARV. L. REV. 1465 (1971) (indicating that "tangible evidence has acquired a reputation as a trustworthy—and 'scientific'— method of proving guilt"). The note states that there is often a high price to pay for acquiring such tangible evidence: the invasion of the security of the home. *Id.* at 1465.

[52] *Id.* (indicating that if law enforcement is forced to turn to less tangible forms of evidence, such as witness statements, there is an increased possibility that "the innocent will be convicted and the guilty go free").

[53] *Investigation and Police Practices*, *supra* note 39, at 71-72 (noting that, because narcotics may be easily destroyed, narcotic investigations often lead to warrantless searches or seizures based on exigent circumstances); *see also King*, 131 S. Ct. at 1857 ("Destruction of evidence issues probably occur most frequently in drug cases because drugs may be easily destroyed by flushing them down a toilet or rinsing them down a drain.").

[54] *See, e.g.*, State v. Linder, 190 N.W.2d 91, 92 (Minn. 1971). In *Linder*, law enforcement officials entered an apartment and observed a person run into the bathroom and flush the toilet. *Id.* The officials fished narcotics out of the toilet while it was being flushed. *Id.*; *see also* Kentucky v. King, 131 S. Ct. 1849, 1857 (2011) (noting that narcotics may be "easily destroyed"); Charles Patrick Garcia, Note, *The Knock and Announce Rule: A New Approach to the Destruction-of-Evidence Exception*, 93 COLUM. L. REV. 685, 702 (1993) (recognizing the "inherent disposability" of narcotic substances).

[55] *See supra* note 2 and accompanying text.

[56] *King*, 131 S. Ct. at 1857 (citing United States v. Duchi, 906 F.2d 1278, 1284 (8th Cir. 1990)). The destruction of evidence exigency is therefore unique in that suspects destroy evidence almost always because of police behavior. This is different from other exigencies, like the emergency aid exigency, where law enforcement can enter a home without a warrant for a multitude of reasons other than those prompted mainly by police activity (such as fighting a fire or preventing a suspect from harming another individual).

given that individuals have little reason to destroy valuable narcotics unless attempting to prevent them from "fall[ing] into the hands of law enforcement."[57] This dilemma presented the courts with the daunting task of drafting a workable test for the police-created exigency doctrine that preserves the well-established destruction of evidence exigency[58] while remaining capable of determining exactly when the police impermissibly manufactured the exigency. As a precondition to invoking the police-created exigency doctrine, the lower courts generally required a showing of "something more than mere proof that fear of detection by the police caused the destruction of evidence."[59] The circuit split arose, however, in defining what constituted "something more."[60] A clear and workable rule for the police-created exigency doctrine was needed, and the Court took on this challenge in *Kentucky v. King*.

II. *KENTUCKY V. KING*

A. The Facts

In October 2005, police officers set up a "controlled buy"[61] of narcotics at an apartment complex.[62] When the sale at issue was complete, several officers received a signal to move in and arrest the suspect.[63] The officers in pursuit received a description of the suspect, whom they were told "entered a specific breezeway at the apartment complex."[64] Because there

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[57] *Id.*; *see also* Grant T. Herrin, *O! Say Can You Smell? Drug Smell Test Taskforces: Police-Created Exigency Doctrine no Longer a Check on Warrantless Search by Police*, 39 S.U. L. REV. 343, 358 ("[B]ecause illegal drugs are so valuable but so easily disposed of, criminals in possession of drugs will not likely destroy them unless they expect the drugs will fall into the hands of the police.").

[58] *King*, 131 S. Ct. at 1857.

[59] *Id.* The Court in *King* noted that if simple causation was sufficient, warrantless entry in the destruction of evidence cases would almost always be precluded and would thus swallow the exception. *Id.*

[60] *Id.* ("[T]he lower courts have held that the police-created exigency doctrine requires more than simple causation, but the lower courts have not agreed on the test to be applied."). For a list of the varying tests for the police-created exigency doctrine prior to *Kentucky v. King*, see *supra* note 15.

[61] For a description of a "controlled buy," see State v. Walker, 444 A.2d 277, 284 (Del. Super. Ct. 1982) ("A 'controlled [buy]' has been defined as 'providing money to a buyer, who is searched before and after making contact with the seller,' and '[i]t also involves police surveillance of as much of the transaction between buyer and seller as possible.'" (alteration in original) (quoting State v. Hawkins, 278 N.W.2d 750, 751 (Minn. 1979)).

[62] King v. Commonwealth, 302 S.W.3d 649, 651 (Ky. 2010).

[63] *Id.*

[64] *Id.*

were several apartments in that breezeway, the officers did not know which apartment the suspect entered.[65] As they entered the breezeway, the officers noticed a strong odor of burnt marijuana coming from an apartment.[66] Believing that the suspect must have entered this apartment, "the officers banged on the . . . door 'as loud as [they] could' and announced, 'This is the police' or 'Police, police, police.'"[67] The officers then heard people moving inside and what sounded like "things . . . being moved inside the apartment,"[68] which led the officers to believe that the apartment's occupants were destroying evidence.[69] As a result, the officers then "explained to [the suspects that the police] were going to make entry inside the apartment,"[70] kicked in the door, and performed a "protective sweep" of the apartment.[71] They found three people—including King—and discovered marijuana, cocaine, crack cocaine, drug paraphernalia, and money.[72] Realizing that the respondent was not their original suspect, the officers then entered the apartment on the right of the breezeway and located the "initial target of their investigation."[73]

B. The Path to the Supreme Court

Kentucky v. King's path to the Supreme Court began at trial when the respondent filed a motion to suppress the evidence obtained during the warrantless search. The Fayette County Circuit Court denied the motion, holding that the warrantless search was justified under the exigent-circumstance

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[65] *See id.* The Kentucky Supreme Court noted that one officer attempted to alert the officers in pursuit that the suspect had entered "the back *right* apartment;" however, the pursuing officers were no longer near their car radio, and never heard this message. *Id.* The pursuing officers simply heard a door "slam shut." *Id.*

[66] *Id.*

[67] Kentucky v. King, 131 S. Ct. 1849, 1854 (2011) (quoting Joint Appendix at 22-23, Kentucky v. King, 131 S. Ct. 1849 (2011) (No. 09-1272), 2010 WL 4628574, at *22, *23.

[68] Joint Appendix, *supra* note 67, at 24.

[69] *Id.*

[70] *Id.*

[71] *Id.* at 25. For a description of a "protective sweep," see Maryland v. Buie, 494 U.S. 325, 327, 335 (1990). A "protective sweep" is a search conducted for the purpose of protecting the arresting officer. *Id.* at 335. It is not a complete and comprehensive search of a premise; rather, a "protective sweep" is merely a "cursory inspection of those spaces where a person may be found." *Id.* The search should last no longer than the amount of time necessary to "dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises." *Id.* at 336.

[72] Kentucky v. King, 131 S. Ct. 1849, 1854 (2011).

[73] *See id.* at 1855.

doctrine.[74] The Kentucky Court of Appeals affirmed the circuit court's ruling on the grounds that the "police reasonably believed that evidence would be destroyed"[75] and held that the police "did not impermissibly create the exigency . . . because they did not deliberately evade the warrant requirement."[76] The Kentucky Supreme Court reversed, and adopted a two-part test to determine when police impermissibly create the exigency.[77] First, the court looked to whether the police created the exigency with a bad faith intent of evading the warrant requirement.[78] Second, the court considered whether it was "reasonably foreseeable" that the police tactics would create an exigency.[79] The Kentucky Supreme Court held that the police impermissibly created the exigency because the destruction of evidence was a "reasonably foreseeable" response to the officers' conduct.[80] The United States Supreme Court recognized the nationwide conflict regarding the police-created exigency doctrine and granted certiorari[81] to determine when "impermissibly created exigent circumstances exist."[82]

C. Analysis and Holding

The Court recognized the legitimacy of both the destruction of evidence exigency[83] and the police-created exigency doctrine,[84] setting out only to determine how these doctrines interact.[85] Through repetition and emphasis, Justice Alito's majority opinion focused extensively on the question of

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[74] *Id.* The Circuit Court held that the warrantless search was justified because the officer's knocking was unanswered, and the police "heard movement in the apartment which he reasonably concluded were persons in the act of destroying evidence, particularly narcotics because of the smell." *Id.* (internal quotation marks omitted).

[75] *Id.*

[76] *Id.* The circuit court essentially applied a bad faith test, requiring the officers to deliberately evade the warrant requirement. *Id.*

[77] King v. Commonwealth, 302 S.W.2d 649, 655-57 (Ky. 2010).

[78] *Id.* at 656.

[79] *Id.*

[80] *Id.*

[81] Kentucky v. King, 131 S. Ct. 1849 (2011), *cert. granted*, 131 S. Ct. 61 (Sept. 28, 2010) (No. 09-1272) (granting *certiorari* only to "Question 1" in the petition).

[82] Petition for Writ of Certiorari at 1, *King*, 131 S. Ct. 1849 (No. 09-1272) (2011). Question 1 of the Petition is as follows: "When does lawful police action impermissibly 'create' exigent circumstances which preclude warrantless entry; and which of the five tests currently being used by the United States Courts of Appeals is proper to determine when impermissibly created exigent circumstances exist?" *Id.*

[83] *King*, 131 S. Ct. at 1856 (citing Brigham City v. Stuart, 547 U.S. 398, 403 (2006)).

[84] *Id.* at 1857 (citing United States v. Chambers, 395 F.3d 563, 566 (6th Cir. 2005)).

[85] *Id.* at 1862-63 ("We decide only the question . . . on which we granted certiorari: Under what circumstances do police impermissibly create an exigency?").

reasonableness.[86] The proper test for the police-created exigency doctrine flows directly from such reasonableness,[87] the very justification for the exigency doctrine itself.[88] Therefore, warrantless entry is justified under the exigent circumstance doctrine when "the conduct of the police preceding the exigency is *reasonable* in the same sense."[89] The Court held that the "exigent circumstances rule applies when the police do not gain entry to premises by means of an actual or threatened violation of the Fourth Amendment."[90] The Court thus adopted an objective test[91] that requires a showing of more than simple causation,[92] placing its sole emphasis on the reasonableness of police action *prior* to the exigency.[93]

III. AMBIGUITY IN *KENTUCKY V. KING*: THE MEANING OF A "THREATENED VIOLATION"

The Court purports to have created a workable legal standard that provides "ample protection for the privacy rights that the [Fourth] Amendment protects."[94] The troubling reality,

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[86] *Id.* at 1856 (quoting *Brigham City*, 547 U.S. at 403. The Court noted that warrantless searches in the home are presumptively *unreasonable*; that this presumption may be overcome because the "touchstone of the Fourth Amendment is *reasonableness*"; and that the warrant requirement is subject to *reasonable* exceptions. *Id.*

[87] *See id.* at 1858 (indicating that "warrantless searches are allowed when the circumstances make it reasonable, within the meaning of the Fourth Amendment, to dispense with the warrant requirement").

[88] *See id.* at 1857-58 ("Despite the welter of tests devised by the lower courts, the answer . . . follows directly and clearly from the principle that permits warrantless searches in the first place.").

[89] *Id.* (emphasis added).

[90] *Id.* at 1862.

[91] The test is objective in this context because it does not account for the subjective intentions or beliefs of law enforcement.

[92] Under the Court's rule, police conduct may still in a way cause the exigency; however, more than simple causation is required to show that the exigency was impermissibly created by the police. *See id.* at 1858 (holding that a warrantless search is justified when the conduct of the police preceding the exigency was reasonable under the Fourth Amendment). For example, if police smell burning opium outside an apartment, and knock on the door, an individual inside may be prompted to get up and flush the opium down a toilet. By knocking, the police essentially caused the suspect inside to destroy the evidence, yet the police did not *impermissibly* cause the suspect to destroy the evidence because their behavior prior to the destruction was reasonable. *See id.* at 1862 (finding no Fourth Amendment violation when police simply knock on a suspect's door because the police are doing no more than a private citizen might do; the occupant does not have to answer the door, and the occupant doesn't have to let the police in).

[93] After indicating that warrantless searches are justified when the circumstances make it reasonable under the Fourth Amendment, the Court stated that "the exigent circumstances rule justifies a warrantless search when the conduct of the police *preceding* the exigency is reasonable . . . ." *King*, 131 S. Ct. at 1858 (emphasis added).

[94] *Id.* at 1862.

however, is that the Court failed to clearly define what actually constitutes a "threatened violation of the Fourth Amendment."[95] This ambiguity poses a threat to the very principles that the Court sought to protect and uphold. Without a clearer understanding of the conduct that invokes the police-created exigency doctrine, lower courts and police are left playing a guessing game with the constitutionally protected privacy rights of our nation's citizens.

Despite the ambiguity as to what constitutes a "threatened violation," the Court did provide two simple examples of how the test may be applied. The first example comes from the Court's analysis of the facts in *Kentucky v. King*. From this analysis, we know that if police bang on a door "as loud as [they] c[an]" and yell "Police, Police, Police," or "this is the Police," they have not threatened to violate the Fourth Amendment.[96] By contrast, the Court also observed that a threatened Fourth Amendment violation occurs when officers "announc[e] that they [will] break down the door if the occupants [do] not open the door voluntarily."[97]

In the absence of any clear rule on the meaning of "threat," these two examples offer little guidance for the lower courts in determining the scope of a threatened violation of the Fourth Amendment.[98] This ambiguity is especially troubling as lower courts attempt to determine whether a threat to violate the Fourth Amendment must be expressly made or whether an implied threat[99] will suffice.[100] The second example provided by

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[95] *See generally id.* Nowhere in the Court's holding is a "threatened violation of the Fourth Amendment" clearly defined. Instead, the Court reiterates that simply knocking on the door of a private residence and asking to speak to the people within does *not* constitute such a threat. *Id.* at 1862; *see also* Herrin, *supra* note 57, at 376 ("It is clear that the police could act unreasonably should they violate the Fourth Amendment with an unlawful search . . . prior to the announcement of their presence. However, after announcing their presence, it becomes exponentially difficult to determine how and when law enforcement can act unreasonably." (footnote omitted)).

[96] *King*, 131 S. Ct. at 1863 (first alteration in original). The Court stated that "[t]his conduct was entirely consistent with the Fourth Amendment." *Id.*

[97] *Id.*; *see also* Herrin, *supra* note 57, at 361 ("[T]he only instance the High Court gave when police could violate the Fourth Amendment in this situation was if the police had announced they would break down the door if King had not opened it.").

[98] The Court failed to indicate whether an implied threat is sufficient, or whether the police must expressly threaten to violate the Fourth Amendment. *King*, 131 S. Ct. 1849.

[99] Within the context of this note, an express threat is a clear and explicit verbal communication of an unambiguous Fourth Amendment violation. *See* BLACK'S LAW DICTIONARY 620 (8th ed. 2004) (defining "express" as "[c]learly and unmistakably communicated; directly stated"). Likewise, an implied threat is conduct other than express verbal communication of a Fourth Amendment violation that can be deemed a threat to violate the Fourth Amendment. *See id.* at 770 (defining "implied" as "[n]ot

the Court deals only with an explicit threat, given that breaking down a door would clearly result in a Fourth Amendment violation where no exigency exists.[101] The Court does not, however, address the applicability of implied threats under their rule. On its face, the rule itself appears to permit implied threats simply because it does not exclude them.[102] On the contrary, the Court suggested an unwillingness to account for implied threats by rejecting the respondent's proposed test, which would have accounted for tone of voice and forcefulness of knocks in determining whether the police created the exigency.[103] As the smoke from this constitutional battle clears,

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directly expressed"). For examples of potential implied threats, see 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 6.5(b) (5th ed. 2012). LaFave suggests that a threat may be implied when police bang on a door, announce their presence, and then state "we know you've got drugs in there" or "we want to search your apartment." *Id.* LaFave also suggests that "persistent banging" and announcing "This is the police" over an extended period of time may be sufficient to constitute a threat. *Id.*

[100] *See id.* LaFave takes note of the ambiguity inherent in *Kentucky v. King*, especially when attempting to determine how "specific" a threat must be to constitute a threatened violation of the Fourth Amendment. *Id.* LaFave notes that the Court's opinion in *King* "leaves plenty of room for mischief" among the lower courts in determining the scope of a threatened violation of the Fourth Amendment. *Id.* Rachel Levick specifically questioned this ambiguity, stating that "[w]here police *implicitly* demand entry to a home, the doctrine does not make clear whether the resulting exigency would be police-created or not . . . ." Rachel Levick, Note, *"Knock, Listen, Then Break the Door Down"? The Police-Created Exigency Doctrine After* Kentucky v. King, 161 U. PA. L. REV. PENNUMBRA 1, 17 (2012), *available at* http://www.pennumbra.com/notes/09-2012/Levick.pdf.

[101] *King*, 131 S. Ct. at 1863 (providing the following example of a threat to violate the Fourth Amendment: "announcing [prior to the exigency] that [the police] would break down the door if the occupants did not open the door voluntarily").

[102] The Court's rule simply includes "threatened," without any explicit mention of the type of the threat required. *Id.* at 1862 ("[T]he exigent circumstances rule applies when the police do not gain entry to premises by means of an actual or threatened violation of the Fourth Amendment."). By omitting a requirement that a threat must be expressly made, it appears as if an implied threat would suffice. *See* LAFAVE, *supra* note 99, § 6.5(b) ("Given the emphasis in *King* on occupants' entitlement to stand on their constitutional rights, one would think that even implied threats would suffice." (internal quotation marks omitted)).

[103] *King*, 131 S. Ct. at 1861 (rejecting the respondent's test, which proposed that police "impermissibly create an exigency when they engage in conduct that would cause a reasonable person to believe that entry is imminent and inevitable" (internal quotation marks omitted)). Under the respondent's proposed test, the "officers' tone of voice" and "the forcefulness of their knocks" would be relevant factors. *Id.* The Court rejected this approach because police may have good reason to knock and announce their presence loudly enough so that occupants are alerted as to their presence. *Id.* In addition, the Court determined that this test would propose difficulty for both officers in the field deciding "how loudly they may knock or announce their presence or how forcefully they may knock," and for lower courts "determin[ing] whether th[e] threshold has been passed." *Id.*

we are left with a vague and contradictory view of the Court's holding that leaves significant room for interpretation.[104]

IV. DEFINING THE SCOPE OF A THREATENED VIOLATION OF THE FOURTH AMENDMENT

Kentucky v. King recognizes an inherent distinction between an *actual* and a *threatened* violation of the Fourth Amendment.[105] To determine how an officer may threaten to violate the Fourth Amendment, we first must address how an officer may actually violate the Fourth Amendment.[106]

A. Actual Violation of the Fourth Amendment

The Fourth Amendment condemns any warrantless search of a home,[107] which the courts have treated as *per se* unreasonable.[108] This presumption can be overcome, however, if

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[104] LAFAVE, *supra* note 99, at § 6.5(b). Regarding the meaning of a threatened violation of the Fourth Amendment, LaFave noted that "King unquestionably leaves plenty of room for mischief." *Id.*

[105] *See King*, 131 S. Ct. at 1862 (holding that the exigent-circumstance doctrine "applies when the police do not gain entry to premises by means of an *actual* or *threatened* violation of the Fourth Amendment" (emphasis added)).

[106] This note focuses solely on Fourth Amendment violations within the context of the home, and assumes that there is a legitimate expectation of privacy. Yet Fourth Amendment protections against unreasonable search and seizure are not limited to the home owner; the protections extend to anyone who "has a legitimate expectation of privacy in the invaded place." Rakas v. Illinois, 439 U.S. 128, 143 (1978) (citing, among others, Katz v. United States, 389 U.S. 347, 353 (1967)). The Court has recognized certain scenarios where individuals may have a legitimate expectation of privacy outside "their" home, such as an overnight guest in the home of another. *See* Minnesota v. Olson, 495 U.S. 91, 98-100 (1990). Note, however, that the Fourth Amendment protections are not attached to places, they are attached to people. *Katz*, 389 U.S. at 351; *see also* Kerr, *supra* note 33, at 810 (indicating that renters have reasonable expectations of privacy in a rented home or apartment, and that similar protections apply to hotel rooms and storage lockers). Therefore, even though this note focuses solely on the home, Fourth Amendment protections do not solely depend on the location of the individual—they apply when "the person invoking its protection can claim a justifiable, a reasonable, or a legitimate expectation of privacy that has been invaded by government action." Smith v. Maryland, 442 U.S. 735, 740 (1979) (internal quotation marks omitted).

[107] Payton v. New York, 445 U.S. 573, 585 (1980) ("Unreasonable searches or seizures conducted without any warrant at all are condemned by the plain language of the first clause of the [Fourth] Amendment.").

[108] California v. Acevedo, 500 U.S. 565, 580 (1991) (holding that searches and seizures "conducted outside the judicial process" are "*per se* unreasonable"). Although this note does not address the issue of consent, a warrantless search may be conducted if consent is given. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) ("It is . . . well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent."). Consent must be freely given such that it is not "coerced, by explicit or implicit means, by implied threat or covert force." *Id.* at 228.

a legitimate exigent circumstance exists[109] that renders a "warrantless search . . . objectively reasonable."[110] Absent such circumstances, then, a warrantless search and seizure results in an actual violation of the Fourth Amendment[111] by the government[112] and thereby infringes a constitutionally recognized expectation of privacy.[113]

An *actual* violation is "fully accomplished" upon the initial "unjustified governmental invasion" of a person's privacy;[114] nevertheless, such invasions may occur under many different circumstances. An unreasonable search may be conducted during the classic physical search, where the police physically enter a home and conduct a search in person.[115] An unreasonable search might also arise from the use of technology that exposes "the details of the home," without

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[109] For further information regarding legitimate exigent circumstances, see *supra* notes 8 and 42.

[110] Mincey v. Arizona, 437 U.S 385, 394 (1978).

[111] U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable searches and seizures*, shall not be violated . . . ." (emphasis added)); *Payton*, 445 U.S. at 584. In *Payton*, the Court recognized that the Fourth Amendment has "two separate clauses, the first protecting the basic right to be free from unreasonable searches and seizures and the second requiring that warrants be particular and supported by probable cause." *Id.* This note focuses only on Fourth Amendment violations in the context of unreasonable search and seizure—Fourth Amendment violations in the issuing of warrants with probable cause are beyond the scope of this analysis. It should be sufficient to note that "[t]he Fourth Amendment does not denounce *all* searches or seizures, but only those deemed *unreasonable*." Raigrodski, *supra* note 3, at 158 (emphasis added).

[112] The Fourth Amendment protects individuals against unreasonable searches and seizures by the government—the Amendment does not protect against private actions. United States v. Jacobsen, 466 U.S. 109, 113-14 (1984) ("[The Fourth Amendment] is wholly inapplicable 'to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any government official.'" (quoting Walter v. United States, 447 U.S. 649, 662 (1980) (Blackmun, J., dissenting)).

[113] Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring) (noting in the concurrence that the heart of a Fourth Amendment analysis in determining whether an individual has a legitimate expectation of privacy is whether a person has a "constitutionally protected reasonable expectation of privacy").

[114] *See* United States v. Calandra, 414 U.S. 338, 354 (1974) ("The purpose of the Fourth Amendment is to prevent unreasonable government intrusions into the privacy of one's person, house, papers, or effects. The wrong condemned is unjustified governmental invasion of these areas of an individual's life. That wrong . . . is fully accomplished by the original search without probable cause.").

[115] For example, in *King*, law enforcement officials physically burst down the door, physically entered the apartment, and conducted a physical search in person. Kentucky v. King, 131 S. Ct. 1849, 1863 (2011); *see also* Kyllo v. United States, 533 U.S. 27, 37 (2001) ("[A]ny physical invasion of the structure of the home, 'by even a fraction of an inch,' [is] too much." (quoting Silverman v. United States, 365 U.S. 505, 512 (1961))).

physically intruding the home.[116] (I will refer to such conduct as a "constructive search.") The Court has recognized constructive searches in various settings, including the use of infrared thermal imaging[117] and electronic listening devices,[118] and has even accounted for new and more sophisticated technologies that may be employed in the future.[119]

B. Threatened Violation of the Fourth Amendment

During oral argument before the Court in *Kentucky v. King*, certain justices expressed a concern that the various tests adopted by lower courts would not invalidate a warrantless search when officers demanded entry prior to the

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[116] *Kyllo*, 533 U.S. at 40 (holding that the government's warrantless use of certain sense-enhancing technologies not "in general public use" violated Fourth Amendment protections against unreasonable search and seizure when it exposed "details of the home that would previously have been unknowable without physical intrusion"); *Silverman*, 365 U.S. at 513 (Douglas, J., concurring) ("[T]he command of the Fourth Amendment [should not] be limited by nice distinctions turning on the kind of electronic equipment employed. Rather our sole concern should be with whether the privacy of the home was invaded."); *see also* Kerr, *supra* note 33, at 804. Kerr indicates that the concern of technology's impact on privacy rights dates back to 1928 when Justice Brandeis declared that "every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment." *Id.* (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)). Kerr further notes that the view that the Fourth Amendment should account for advances in technology has been embraced by legal theorists, constitutional scholars, and "nearly everyone else who has written on the intersection of technology and criminal procedure." *Id.*

[117] *See Kyllo*, 533 U.S. at 40 (holding that the use of "Thermovision imaging" was a search, and was "presumptively unreasonable without a warrant").

[118] *See Katz*, 389 U.S. at 353.

> The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a "search and seizure" within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance.

Id.

[119] *Kyllo*, 533 U.S. at 36 ("While the technology used in the present case was relatively crude, the rule we adopt must take account of more sophisticated systems that are already in use or in development."); *id.* at 40 ("Where . . . the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant."). For further information regarding the impact of technology on Fourth Amendment jurisprudence, and for a discussion of the potential future impact of *Kyllo* on the Fourth Amendment regarding the government's use of technology, see Tracey Maclin, Katz*,* Kyllo*, and Technology: Virtual Fourth Amendment Protection in the Twenty-First Century*, 72 MISS. L.J. 51 (2002).

exigency.[120] Justice Scalia even noted that an officer who gives off the impression that he possesses a warrant and demands entry is technically not violating the Fourth Amendment at that very moment.[121] This concern likely served as the justification behind the Court's inclusion of the "threatened violation" rhetoric in the rule, based on a theory that law enforcement should not be able to threaten behavior that would be inconsistent with the Fourth Amendment even though the assertion itself is not a Fourth Amendment violation.[122] In other words, the Court seemed to recognize that a threatened violation of the Fourth Amendment that creates an exigent circumstance ought not to excuse the general warrant requirement in the same way that a naturally arising exigency would.

C. The "Reasonably Interpreted Threat Test"

1. The Test

Following *King*, lower courts have been left with the task of determining what behavior sufficiently constitutes a threatened violation of the Fourth Amendment.[123] For the reasons stated below, this note proposes that the lower courts adopt the "Reasonably Interpreted Threat test." Under this test, a threat to violate the Fourth Amendment includes (1) any assertion by a government official (verbal or physical), (2) reasonably expressing (3) an intent to act in violation of the Fourth Amendment (4) when viewed objectively under the totality of the circumstances. This test resolves the ambiguity in *King* regarding the scope of a threatened violation of the Fourth

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[120] *See generally* Transcript of Oral Argument, Kentucky v. King, 131 S. Ct. 1849 (2011) (No. 09-1272). In particular, Justice Sotomayor asked, "What if the officers had simply knocked, said 'We're going to kick the door in if you don't open it'?" *Id.* at 15. Following a similar threat, Justice Scalia asked, "Is it—is it unlawful? Is—is saying 'Open up, police,' is that unlawful?" *Id.* at 33. Later, Justice Scalia asked, "Do you have any doubt that it's unlawful for a police officer to threaten to burst into a home?" *Id.* at 47.

[121] *Id.* at 52 ("It wouldn't technically be a Fourth Amendment violation, would it, if the police gave the impression that they had a warrant and were about to kick in the door? Is that a Fourth Amendment violation in and of itself?")

[122] *See* Kentucky v. King, 131 S. Ct. 1849, 1862 (2011); Transcript of Oral Argument, *supra* note 120, at 52.

[123] *See* LAFAVE, *supra* note 99, § 6.5(b) (stating that, post-*King*, the usual question presented to the lower courts will be whether police conduct "deserves to be characterized as a threat to violate the Fourth Amendment," and whether or not a threat has to be specific). The Supreme Court left open many questions for the lower courts: Can a threat be implied or must it be explicit? What constitutes an implied threat? What constitutes an express threat? Must a threat be verbalized, or can a threat be express or implied through physical behavior?

Amendment[124] by treating *any* assertion—whether verbal or physical, implied or express—as such a threat.

The justification is simple: the reasonableness standard used to analyze *actual* violations of the Fourth Amendment should also be used to analyze *threatened* violations of the Fourth Amendment. The only difference in the analysis of an actual and threatened violation is one additional step. In determining whether law enforcement conducted an *actual* violation of the Fourth Amendment, the Court must decide whether an officer (1) engaged in behavior (2) that violates the Fourth Amendment. *Kentucky v. King* added another link to this chain: in determining whether law enforcement *threatened* to violate the Fourth Amendment, the Court must decide whether they (1) threatened (2) to engage in behavior (3) that violates the Fourth Amendment. The Reasonably Interpreted Threat test simply isolates the actual behavior alleged to constitute a threatened violation of the Fourth Amendment and subjects that behavior to its own separate reasonableness analysis.

2. Explicit and Implied Threats

The Court's holding in *Kentucky v. King* could be interpreted to treat only explicit threats as a threatened violation, based on the little guidance the Court offered in its rejection of the respondent's test[125] and the one example it provided.[126] But when analyzing the holding, it becomes evident that the Court's rule *can* and *must* account for implied and explicit threats.[127] The Court's holding explicitly states that the

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[124] *See supra* Part III for further discussion of the ambiguity in the Court's holding.

[125] The respondent's proposed test accounted for implied threats as well as explicit threats. *See supra* note 103 and accompanying text.

[126] The only additional example provided by the Court dealt with an explicit threat. *See supra* note 101 and accompanying text. Seeing that the court rejected the respondent's test accounting for implied threats, and included only one example describing an explicit threat, it is likely that academics and lower courts will assume that this test applies only to explicit threats—an assumption that this note rebuts. *See* LAFAVE, *supra* note 99, § 6.5(b). LaFave seems confident that, under the test in *King*, a threatened violation of the Fourth Amendment must be explicit, and he states that the determination of whether or not such a threat exists will hinge on "the exact words utilized by the police." *Id.*

[127] Several lower courts have already begun to address the issue of implied threats; however, no court has tackled the application of implied threats head on. For example, in a Tenth Circuit case, the defendant argued that the "show of military force . . . clearly implied that if there was no compliance with [the police's] demands the Fourth Amendment would be violated." United States v. Ramirez-Fragozo, 490 F. App'x 125, 128-29 (10th Cir. 2012). The Tenth Circuit did not state that such conduct was incapable of constituting a threat; rather, they dismissed this argument on the

"exigent circumstances rule justifies a warrantless search when the conduct of the police preceding the exigency is reasonable [under the Fourth Amendment],"[128] and when police did not create the exigency by "threatening to engage in conduct that violates the Fourth Amendment."[129] The Court suggests that a reasonableness analysis focuses on police conduct preceding the exigency (which would include the alleged threat) without any distinction made as to the means by which that threat was asserted. Thus, certain implied or non-verbal conduct may reasonably express a Fourth Amendment violation just as well as explicit verbal assertions. For example, if a police officer bangs loudly on a door, and yells "open up, or else," the ambiguity of the term "or else" indicates that there is no express threat to violate the Fourth Amendment: "or else" may mean "or else I'm going to kick the door in" (a threat to violate the Fourth Amendment) or "or else" may mean "or else I am going to walk away and seek a warrant from an impartial magistrate" (no threat, but rather reasonable police conduct). The ambiguity here may indicate that, under the proposed test, this is not an objectively reasonable threat to violate the Fourth Amendment. But if the officer yelled "open up, or else," and placed a door-breaching ram up against the door, the circumstances may make this an objectively viewed threat to violate the Fourth Amendment. Such implied threats should be subject to a Fourth Amendment reasonableness analysis.

Although the Court usually expresses a preference for bright line rules clearly indicating what type of behavior is permissible,[130] the rule in *King* does not accomplish this.[131]

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ground that there was "no evidence that the occupants were aware of the extent of the police presence or felt threatened." *Id.* at 129. The District Court in Utah even appeared to directly address the issue of implied threats when they held that police threatened to violate the Fourth Amendment when "they attempted to enter [a hotel] room with [a] key card" prior to the exigency. United States v. Estrada, No. 1:11-CR-101 TS, 2012 WL 2367992, at *6 (D. Utah June 21, 2012).

[128] Kentucky v. King, 131 S. Ct. 1849, 1858 (2011).

[129] *Id.*

[130] *See* Maclin, *supra* note 119, at 69-71. Maclin indicates that modern Fourth Amendment jurisprudence expresses a preference for bright line rules over balancing tests, and provides a list of seven cases supporting this proposition. *Id.*

[131] An example of a bright line rule is that in *Minnesota v. Olson*, where the Court "held that an overnight guest is entitled to rely on the privacy of his host's home." *Id.* at 69 n.98 (citing Minnesota v. Olson, 495 U.S. 91, 93 (1989)). This is a bright line rule because it provides clear guidance as to the privacy protection afforded to an overnight guest. The rule in *King* is not a bright line rule because it does not explicitly state the conduct sufficient to constitute a threat. *See King*, 131 S. Ct. at 1861. A bright line rule would thus state an "explicit verbal threat," not just "threat" alone.

Therefore, for the sake of "provid[ing] ample protection for the privacy rights that the [Fourth] Amendment protects,"[132] the lower courts should subject any threat—implied or express, verbal or non-verbal—to an objective reasonableness review by considering the threat under the totality of the circumstances.

V. THE REASONABLY INTERPRETED THREAT TEST FLOWS DIRECTLY FROM FOURTH AMENDMENT JURISPRUDENCE AND *KENTUCKY V. KING*

The Reasonably Interpreted Threat test draws support directly from the Court's analysis in a long line of Fourth Amendment cases on the subject and preserves the goals the Court sought to achieve in *Kentucky v. King*. In addition, the Reasonably Interpreted Threat test adequately responds to many concerns expressed by the Court regarding the respondent's proposed test in *King*.[133] The lower courts should thus adopt the Reasonably Interpreted Threat test when analyzing the destruction of evidence exigency and the police-created exigency doctrine.

A. Consistency with Kentucky v. King

The Reasonably Interpreted Threat test promotes the Court's desire for consistency. The Court in *King* expressed a concern for consistency by basing its inquiry upon the justification for warrantless search and seizure in the first place: Fourth Amendment reasonableness.[134] The Court supported its holding by comparing the reasonableness test to tests adopted by the Court in other warrantless search and seizure scenarios, including, for example, the tests for the

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[132] *King*, 131 S. Ct. at 1862.

[133] *See supra* note 103 and accompanying text.

[134] *King*, 131 S. Ct. at 1858.

> Despite the welter of tests devised by the lower courts, the answer to the question presented in this case follows directly and clearly from the principle that permits warrantless searches in the first place. As previously noted, warrantless searches are allowed when the circumstances make it reasonable, within the meaning of the Fourth Amendment, to dispense with the warrant requirement. Therefore, the . . . exigent circumstances rule justifies a warrantless search when the conduct of the police preceding the exigency is reasonable in the same sense.

Id. at 1857-58.

seizure of evidence in plain view[135] and consent-based encounters.[136] Moreover, the Court's adoption of a purely objective standard that ignores subjective state of mind is consistent with historical Fourth Amendment jurisprudence.[137]

The Reasonably Interpreted Threat test preserves the Court's preference for objective review,[138] analyzes the threat under the totality of the circumstances,[139] and subjects the behavior (the alleged threat) to the reasonableness analysis that is at the heart of the Fourth Amendment.[140] Reasonableness "permeates most Fourth Amendment doctrines" and serves as the "substantive command of the Fourth Amendment."[141] Fourth

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[135] *Id.* (citing Horton v. California, 496 U.S. 128, 136, 140 (1990)) (stating police "may seize evidence in plain view, provided that they have not violated the Fourth Amendment in arriving at the spot from which the observation of the evidence is made"). The Court further indicated that the subjective intent of the officer is irrelevant in determining whether the seizure was justified; all that matters is whether the officer violated the Fourth Amendment in reaching the location where the evidence was seized. *Id.*

[136] *Id.* (citing INS v. Delgado, 466 U.S. 210, 217 n.5 (1984)) (stating that an officer "may seek consent-based encounters if they are lawfully present in the place where the consensual encounter occurs"). For example, if an officer has not violated the Fourth Amendment in reaching their location, he or she may seek consensual encounters with an individual. *Id.* The Court further explained that, in such an instance where "consent is freely given," the subjective intent of the officer in approaching the individual is irrelevant to a determination of the encounter's validity. *Id.*

[137] *Id.* at 1859 (quoting Brigham City v. Stuart, 547 U.S. 398, 404 (2006) (internal quotation marks omitted)) (holding that Fourth Amendment case law has "repeatedly rejected a subjective approach," and that a test based on reasonableness is generally objective). For arguments in support of an objective standard prior to the holding in *King*, see generally Bryan M. Abramoske, Note, *It Doesn't Matter What They Intended: The Need for Objective Permissibility Review of Police-Created Exigencies in "Knock and Talk" Investigations*, 41 SUFFOLK U. L. REV. 561 (2008).

[138] *See King*, 131 S. Ct. at 1859 (quoting *Horton*, 496 U.S. at 136, 138) ("'[E]ven-handed law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer.'"); *supra* notes 27, 137 and accompanying text.

[139] Fourth Amendment reasonableness is an objective measure viewed under the totality of the circumstances. Ohio v. Robinette, 519 U.S. 33, 39 (1996). Analyzing the threat under the totality of the circumstances is consistent with the review applied to determine the validity of an exigent circumstance: When determining whether the exigencies of the situation make a warrantless search objectively reasonable, the courts are essentially analyzing whether, under the totality of the circumstances, a legitimate exigency was present. Mincey v. Arizona, 437 U.S. 385, 393-94 (1978) ("[W]arrants are generally required to search a person's home or his person unless 'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." (quoting McDonald v. United States, 335 U.S. 451, 456 (1948)).

[140] *King*, 131 S. Ct. at 1856 (quoting Brigham City v. Stuart, 547 U.S. 398, 403 (2006) (internal quotation marks omitted)) ("[T]he ultimate touchstone of the Fourth Amendment is reasonableness."); Florida v. Jimeno, 500 U.S. 248, 250 (1991) ("The touchstone of the Fourth Amendment is reasonableness.").

[141] Raigrodski, *supra* note 3, at 158.

Amendment reasonableness informs warrant requirements,[142] legitimate expectations of privacy,[143] the exigent-circumstances rule,[144] and now, the police-created exigency doctrine.[145] As such, behavior alleged to constitute a threatened violation of the Fourth Amendment should receive the same reasonableness review.[146] Doing so maintains a doctrinal consistency, offering relatively clear guidelines for both citizens and law enforcement officers.

Similar to the Court's holding in *King*, the Reasonably Interpreted Threat test does not require analysis of the "foreseeable" mental response of the occupant of a premises, thus reducing the burden on law enforcement officials in the field.[147] In addition, the Reasonably Interpreted Threat test recognizes that a warrantless search may occasionally be justified, even in situations where police could have sufficiently demonstrated probable cause to obtain a warrant and had time to do so.[148]

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[142] *See Brigham City*, 547 U.S. at 403 (noting that warrantless searches and seizures are presumptively *unreasonable*) (emphasis added); *see also* Raigrodski, *supra* note 3, at 158. Dr. Raigrodski argues:

> The concept of reasonableness permeates most Fourth Amendment doctrines, such as the reasonable expectations of privacy, reasonable suspicion, and reasonable person standards. More importantly, reasonableness operates as the overarching norm of the Fourth Amendment. The Fourth Amendment does not denounce all searches and seizures, but only those deemed unreasonable, and reasonableness is set forth as the ultimate constitutional standard. Reasonableness is both the substantive command of the Fourth Amendment and its preferred methodology, and is the meta-narrative of search and seizure law.

Id. (footnotes omitted).

[143] Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring) (noting in the concurrence that the heart of a Fourth Amendment analysis in determining whether an individual has a legitimate expectation of privacy is whether a person has a "constitutionally protected *reasonable* expectation of privacy" (emphasis added)).

[144] *King*, 131 S. Ct. at 1856 ("One well-recognized exception [to the warrant requirement] applies when the exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search is *objectively reasonable* under the Fourth Amendment." (second alteration in original) (emphasis added) (internal quotation marks omitted) (quoting Mincey v. Arizona, 437 U.S. 385, 394 (1978)).

[145] *Id.* at 1858 ("[When] . . . the police [do] not create the exigency by engaging or threatening to engage in conduct that violates the Fourth amendment, warrantless entry to prevent the destruction of evidence is *reasonable* and thus allowed." (emphasis added)).

[146] *Id.* ("[T]he exigent circumstances rule justifies a warrantless search when the *conduct* of the police preceding the exigency is *reasonable* . . . ." (emphasis added)); *see also* Pennsylvania v. Mimms, 434 U.S. 106, 108-09 (1977) ("The touchstone of our analysis under the Fourth Amendment is always 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.'" (quoting Terry v. Ohio, 392 U.S. 1, 19 (1968))).

[147] *See King*, 131 S. Ct. at 1860 (recognizing that law enforcement officials are placed in scenarios where they must make split-second decisions, and that forcing officials to determine the foreseeable responses to their tactics would create great difficulty).

[148] *See id.* (recognizing many legitimate reasons why police may not seek a warrant as soon as probable cause is established, and providing examples).

Therefore, the Reasonably Interpreted Threat test is consistent with the Court's goal of promoting investigative efficiency because it does not require police to halt every investigation the very instant that they obtain the minimum amount of evidence necessary for establishing probable cause,[149] a duty found nowhere in the Constitution.[150]

Moreover, the Reasonably Interpreted Threat test provides "ample protection for the privacy rights [guaranteed by] . . . the Fourth Amendment" that the holding in *Kentucky v. King* sought to further.[151] The Court states that the rule announced in *King* does not in any way reduce an individual's Fourth Amendment privacy rights because when an officer does "no more than any private citizen might do" by knocking on a door of a premises and requesting to speak with its occupant.[152] In response, "the occupant [would have] no obligation to open the door or to speak" because the test applies entirely to the conduct of the police and poses no obligation on the occupant.[153] An occupant that does open the door, however, can still deny entry or refuse to answer any questions.[154] Under the Reasonably Interpreted Threat test, then, a mere knock upon a door of a premises followed by a request to speak to its occupant would not constitute a threat to violate the Fourth Amendment, especially under an objective reasonableness standard. By contrast, an officer could not follow a knock and request to speak by banging on the door and violently screaming "open up or else!" Further, the Reasonably Interpreted Threat test still enables the exigent circumstances doctrine to survive because a warrantless search is still justified when occupants respond to lawful police behavior by "attempt[ing] to destroy evidence."[155]

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[149] *Id.* at 1860-61 ("[L]aw enforcement officers are under no constitutional duty to call a halt to criminal investigation the moment they have the minimum evidence to establish probable cause." (quoting Hoffa v. United States, 385 U.S. 293, 310 (1966) (internal quotation marks omitted))).

[150] *Id.* at 1861 ("Faulting the police for failing to apply for a search warrant at the earliest possible time after obtaining probable cause imposes a duty that is nowhere to be found in the Constitution.").

[151] *Id.* at 1862 ("This holding provides ample protection for the privacy rights that the [Fourth] Amendment protects.").

[152] *Id.* ("When law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do.").

[153] *Id.* (citing Florida v. Royer, 460 U.S. 491, 497-98 (1983)).

[154] *Id.*

[155] *Id.* ("Occupants who choose not to stand on their constitutional rights but instead elect to attempt to destroy evidence have only themselves to blame for the warrantless exigent-circumstances search that may ensue.").

B. Consistency with Fourth Amendment Jurisprudence

The Reasonably Interpreted Threat test comports with the Court's analysis of Fourth Amendment issues outside the context of *Kentucky v. King*. In particular, recognition of both explicit and implicit threatened violations remains consistent with the Court's similar understanding that Fourth Amendment violations can arise both through physical and constructive means.[156] For instance, police can conduct a search either by physically entering a home or by "constructively" searching it through the use of technology.[157] Any warrantless search that violates that is unreasonable and violates the Fourth Amendment, irrespective of the means employed by law enforcement in doing so.[158] Similarly, a threat to violate the Fourth Amendment does not become less of a threat simply because it is implied rather than explicitly stated.

In addition, recognition of both explicit and implied threats parallels the Supreme Court's analysis in determining whether an individual has freely consented to a police search.[159] When analyzing the validity of consent, a court must determine whether the consent was the product of coercion by law enforcement.[160] A court must make this determination by assessing the totality of the circumstances.[161] Under the totality approach, "consent must not be coerced, by explicit or implicit

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[156] *See supra* Part. IV.A.

[157] Katz v. United States, 389 U.S. 347, 362 (1967) (Harlan, J., concurring) ("[R]easonable expectations of privacy may be defeated by electronic as well as physical invasion."); Kyllo v. United States, 533 U.S. 27, 40 (2001) ("Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant.").

[158] Silverman v. United States, 365 U.S. 505, 511-12 (1961). The determination of whether there was a Fourth Amendment violation "is based upon the reality of an actual intrusion into a constitutionally protected area," not the type of surveillance microphones used to intrude. *Id.*; *see also* Kerr, *supra* note 33, at 804. Kerr indicates that the concern of technologies impact on privacy rights dates back to 1928 when Justice Brandeis declared that "every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment." *Id.* (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

[159] Consent to search has been recognized by the Court as a valid exception to the Fourth Amendment's warrant requirement. *See* Groh v. Ramirez, 540 U.S. 551, 559-60 (2004).

[160] In order for consent to a search to be valid, it must be voluntarily given. Schneckloth v. Bustamonte, 412 U.S. 218, 228 (1973) (stating that the Fourth Amendment "require[s] that a consent not be coerced").

[161] *Id.* at 229 (noting that the Court will "examine all the surrounding circumstances to determine" the voluntariness of consent).

means, [or] by implied threat or covert force"[162] because any coercion, "no matter how subtl[e]," would result in unjustified police intrusion in violation of the Fourth Amendment.[163] The Reasonably Interpreted Threat test follows from the same reasoning because an entry gained by a threatened Fourth Amendment violation, whether explicit or implicit, would still result in an unreasonable police intrusion that violates the Fourth Amendment.[164]

C. Concerns From the Respondent's Proposed Test

The respondent's proposed test contained a reasonableness element that appeared to account for implied threats.[165] Although the Court was unwilling to accept this particular formulation, this does not suggest that the Court intended to create a blanket exception rejecting all implied threats. On the surface, the Reasonably Interpreted Threat test may appear similar to the test proposed by the respondent, given that both focus on the question of reasonableness. However, upon closer inspection, crucial differences exist that render the Reasonably Interpreted Threat test starkly different from respondent's test, while remaining consistent with the Court's holding in *Kentucky v. King*.

The respondent's test contained a component of foreseeability that the Reasonably Interpreted Threat test does not. The foreseeability component troubled the Court because the test emphasized reasonableness both with respect to the conduct of the police *and* the foreseeable mental effect of that conduct on the occupant.[166] A critical issue arises with the foreseeability component because Fourth Amendment reasonableness analysis focuses solely on the conduct of the government, not the "foreseeable" mental response of the

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[162] *Id.* at 228.

[163] *Id.*

[164] The Court in *Schneckloth* based part of its reasoning on the belief that the Court should protect against even subtle intrusions on constitutional protections. *Id.* at 228-29 ("[I]llegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure. . . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." (quoting Boyd v. United States, 116 U.S. 616, 635 (1886) (internal quotation marks omitted)).

[165] *See supra* note 103.

[166] Kentucky v. King, 131 S. Ct. 1849, 1861 (2011). The respondent's test asked whether a reasonable person would believe entry to be "imminent and inevitable," thus placing the focus of the analysis on what a reasonable occupant would foresee the police doing. *Id.* The Court has already expressed discontent with adopting a foreseeability component because of the potential for unpredictability. *Id.* at 1859.

respondent.[167] Contrary to the respondent's proposed test, the Reasonably Interpreted Threat test focuses solely on the conduct of law enforcement, paying no attention to what a reasonable person would believe the police are actually about to do.[168] Therefore, the Reasonably Interpreted Threat test does not require the courts to assume the daunting and unpractical task of attempting to gauge foreseeability,[169] thus avoiding the "unacceptable degree of unpredictability"[170] that plagued the respondent's proposed test.

In addition to the fatal foreseeability requirement, the respondent's test failed because of the insufficiency of the factors it considered when determining whether a reasonable person would believe entry was imminent and inevitable.[171] As such, the test did not fail because of any sort of disagreement that the Court may have held with the application of implied threats.[172] The Court believed that any need to consider the tone of voice and forcefulness of knocks would place a great burden on both law enforcement and the lower courts.[173] Along those lines, the Court stated that "[t]he Fourth Amendment does not require [such a] nebulous and impractical test."[174] However, under the Reasonably Interpreted Threat test, a police officer could bang on a door as loud as possible, screaming "Police! Police!" without necessarily violating the Fourth Amendment because, viewed alone, this conduct would not constitute a threat.

Because the Reasonably Interpreted Threat test applies a totality of the circumstances approach, the courts could at times consider tone of voice and forcefulness of knocks even

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[167] The Fourth Amendment protects only against unreasonable searches and seizures conducted by the government, not private individuals. *See supra* note 112. In addition, the Court in *King* recognized that, when determining whether the exigent circumstance rule applies, attention must be paid to the reasonableness of the police conduct preceding the exigency. *King*, 131 S. Ct. at 1858.

[168] The focus on the reasonableness of police conduct alone is consistent with the Court's holding in *King*. *King*, 131 S. Ct. at 1858 ("[T]he exigent circumstances rule justifies a warrantless search when *the conduct of the police preceding the exigency* is reasonable in the same sense." (emphasis added)).

[169] *See id.* at 1859-60 (providing examples illustrating the difficulty of such a task).

[170] *Id.* at 1859.

[171] *See id.* at 1861.

[172] The Court noted that if it had adopted the respondent's test, it would create difficulty for law enforcement and the lower courts; however, the Court did *not* say that implied threats in general are insufficient to violate the Fourth Amendment. *Id.*

[173] *Id.* (noting how respondent's test would propose difficulty for law enforcement in determining how loud they may announce their presence, and for the courts in determining whether or not such a threshold has been passed).

[174] *Id.*

though this conduct would not be viewed as a threat on its own. Such conduct would play into a court's analysis under the Reasonably Interpreted Threat test, particularly when accompanied by a vague statement ("open up or you will regret it"[175]) or a suggestive act (placing lock pick in the cylinder of the door[176]). This is true because a vague statement or suggestive action could very well reasonably assert a threat to engage in conduct that would violate the Fourth Amendment because both would indicate an officer's intent to open the door in the absence of consent by the suspect. In contrast to the respondent's proposed test, the Reasonably Interpreted Threat test analyzes only whether a reasonable person would reasonably interpret the police conduct to threated a Fourth Amendment violation. Because reasonableness analysis stands as "the touchstone of the Fourth Amendment,"[177] this test is thus far from "nebulous and impractical."

D. Examples to Provide Guidance

The chart below provides some examples of how police conduct could be analyzed under the Reasonably Interpreted Threat test. These examples demonstrate the spectrum of actions that lie between the "no threat" and "explicit threat" categories.[178] The Reasonably Interpreted Threat test would provide a principled framework for analyzing this middle ground police behavior.

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[175] Other examples of such vague verbal expressions include statements like "open up, or else," and "open up, this is your last chance." Note how these statements are inherently different from simply announcing police presence, or requesting to speak with the occupant. The statements suggest that some action may be taken if the occupant does not comply, such as breaking down the door. Therefore, while the statements may not explicitly contain a threat to violate the Fourth Amendment (such as "open up or I will kick the door in")—because the former statements can be construed to mean "open up, or else we will get a warrant"—they may have the same effect by reasonably asserting an impermissible threat under the totality of the circumstances.

[176] Other examples of such suggestive actions could include lining up a door ram, or cocking back the action of a shotgun with a door-breaching muzzle attached. Similar to vague verbal expressions, these actions suggest that some action, such as breaching the door, may be taken if the occupant does not comply.

[177] *See supra* note 140.

[178] Note, however, that this is not an exhaustive list; rather, this list simply contains several examples of a potentially limitless set of facts.

-The Police approach the door of a home, knock loudly, and announce, "This is the Police!" -The Police do not have a warrant, no exigent circumstances are present, and no consent is given. -The following examples indicate how courts should interpret further police conduct under the Reasonably Interpreted Threat test.	
No Threat	"We would like to have a word with you."
Reasonably Interpreted Threat	"Open up now, or else!"
	"Open this door. We know you're in there!" The doorknob is turned and the door is shaken, but the door isn't opened.
	"This is your last chance, I'm warning you!"
	"You better open up. I don't want to have to do this!" A door lock pick is placed in the lock cylinder.
	"We know you're in there. Open up or you will regret it!" A door-breaching battering ram is placed up against the lock.
	"Open up! I am going to count to three! One . . . Two . . . Three!" A shotgun with a door-breaching muzzle is placed up against the lock cylinder, and the shotgun is loaded and cocked back.
	After waiting briefly, one officer tells another, "Go get the door breach; we may have do this the hard way."
Explicit Threat	"Open up this door, or else we will break it down and come in there!"

CONCLUSION

The Reasonably Interpreted Threat test will, concededly, place a small requirement on law enforcement to think a little deeper about their actions and word choice before approaching a home. This slight burden on law enforcement, however, does not present a legitimate reason to abandon an objective reasonableness requirement.[179] While it would be

[179] The privacy protections granted by the Fourth Amendment "may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal

easier to interpret the Court's holding as establishing a bright-line rule classifying only explicit verbal statements as threats, the touchstone of the Fourth Amendment is reasonableness, not pure simplicity. The Reasonably Interpreted Threat test does not aim to take the easy way out, but instead seeks to achieve the best possible balance between constitutionally protected privacy rights and investigative efficiency. Making minor adaptations to investigative procedure can mitigate this slight burden. For example, states can draft department-wide policies prohibiting certain vague verbal expressions or conduct that expresses a threat to violate the Fourth Amendment when approaching a home. The now-or-never scenarios encountered by law enforcement may require police to make split-second decisions.[180] But these decisions still must be made rationally and in accordance with the protections afforded by the Fourth Amendment and the police-created exigency doctrine. Using the framework of the Reasonably Interpreted Threat test, law enforcement can adopt guidelines and procedural requirements without having to guess what might constitute an impermissible threat.[181] The proposed test permits actions that law enforcement may have good reason to take[182] while forbidding actions that amount to threats to go beyond the constitutional limits of the police-created exigency doctrine and the Fourth Amendment.

Christopher LoGalbo[†]

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law." Mincey v. Arizona, 437 U.S. 385, 393 (1978). "[T]he mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment." *Id.*

[180] *King*, 131 S. Ct. at 1860 (recognizing that law enforcement officials are often placed in scenarios where they must "make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving" (citing Graham v. Connor, 490 U.S. 386, 396-97 (1989)).

[181] Law enforcement can instruct against the use of certain verbal or physical assertions reasonably interpreted as a threat to violate the Fourth Amendment, such as a ban on the use of ambiguous demands like "open up or else" or the placement of a battering ram at the door of an individual's home.

[182] *King*, 131 S. Ct. at 1861 (noting that law enforcement "may have a very good reason" to knock loudly and to identify themselves to citizens).

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